

Because BA-NY's performance has improved over time, the Commission should look to the company's most current performance data for an accurate assessment of the state of BA-NY's compliance with Section 271.

As of the date of its application, BA-NY's most recent performance data describes its August 1999 service levels. This data is presented in BA-NY's application as raw scores.⁵⁸ In order to help judge the significance of this voluminous data set, the Commission should consider how the August performance data would be scored if the PAP/CCAP were in effect. Both BA-NY and NYSPSC Staff have confirmed what PAP/CCAP scores and penalties would result from the August 1999 performance levels. The results of such a scoring are set out in the attached NYSAG Appendix B. In reviewing the PAP/CCAP scoring, the most significant metrics, those weighted 15 or 20 in each mode of entry category, deserve the closest examination.

As set forth in BA-NY's PAP/CCAP,⁵⁹ monthly performance results for each metric are scored either a "zero," "-1" or "-2." A zero score represents parity service, or service that meets an absolute standard. A -1 score indicates that BA-NY's performance for the CLECs may be discriminatory ("discrimination is in question"), and if repeated in either of the two succeeding

⁵⁸ *Id.*, pp. 96-107 of 108. Where BA-NY's retail service is analogous to its wholesale service to CLECs, the standards apply a parity measurement. Other metrics where no such BA-NY retail comparison is possible are measured against absolute standards set by the NYSPSC. With some exceptions, most of the absolute C2C performance standards require BA-NY to perform at a 95% level to provide service deemed adequate for effective competition.

⁵⁹ *See, Attachment C, Exhibit 1, Dowell-Canny Joint Declaration*, pp. 5-6.

monthly reports, would result in a penalty.⁶⁰ A -2 score means that BA-NY's performance for its CLEC customers is probably discriminatory, and a greater penalty is charged.⁶¹

The August 1999 data demonstrates that BA-NY is doing well on numerous metrics (*i.e.*, achieves a score of zero under the PAP/CCAP). However, a few of the most critical metrics indicate that BA-NY is still failing to provide bottleneck services adequately.

For August 1999, BA-NY had three UNE mode of entry category metrics weighted 15 or 20 which scored -2 and two which scored -1.⁶² For the Resale mode of entry, BA-NY had no -2 scores in the heavily weighted category, and three -1 scores.⁶³ No Interconnection mode

⁶⁰ The amount of the -1 penalties is determined on a sliding scale according to how far below the standard BA-NY's performance falls. Under an absolute standard, -1 performance lies between 90% and 95%. For those standards measured on a parity basis, the difference between BA-NY's retail performance and its CLEC performance is statistically analyzed to take into account the number of the monthly actions being measured for both BA-NY and the CLECs. A "Z" score (one standard deviation at the 95% confidence level) is computed, and if this falls between -.8225 and -1.645, then the monthly performance is scored a -1 under the PAP.

⁶¹ Absolute standard metrics computed at 90% or worse are scored -2 under the PAP. Parity metrics with Z scores of -1.645 or worse are scored -2 under the PAP.

⁶² The -2 scores for the following metrics were: OR-2-04-3320 (Percent On Time LSR Rejects-Pots), MR-3-01-3100 (Percent Missed Repair Appointments - Loop), and MR-4-02-3100 (Mean Time To Repair - Loops); and the -1 scores were: PO-1-01-2000 (Customer Service Record), OR-2-02-3320 (Percent On Time LSR Rejects-Specials). *See, NYSAG Appendix B.* This data was prepared by NYSPSC Staff and confirmed to be accurate by BA-NY counsel.

⁶³ The -1 scores were for PO-1-01-2000 (Customer Service Record), OR-2-04-2320 (Percent On Time LSR Reject - Pots) and MR-5-01-2200 (Percent repeat Reports within 30 days - Specials). *Id.*

score was -2. BA-NY's Collocation mode of entry scores included no -2 and only one -1 in the heavily weighted metrics.⁶⁴

For all four modes of entry combined, BA-NY's August performance in the most important metrics showed only three important metrics at -2 and six others at -1. Because it is possible that BA-NY's six significant -1 August scores may be isolated anomalies,⁶⁵ the Commission should focus most closely on the three heavily weighted August 1999 metrics scored -2.

One of BA-NY's August 1999 -2 results for heavily weighted metrics is the "Percent On Time LSR Reject Pots" (OR-2-04-3320 electronic - no flow through), which is weighted 15 in the PAP/CCAP. The NYSPSC adopted 95% as the performance standard expected of BA-NY for this metric (a -2 score indicates performance below below 90%). BA-NY's August performance reported for this metric was at 82.9%, which is much worse than the -2 threshold. This deficient service greatly impairs CLEC ordering efficiency because such a high frequency of delayed order reject notices interferes with a CLEC's ability to serve its customers in a timely and professional manner, and may cause postponements of installations because the CLEC is not notified of the problem that caused the order to be rejected soon enough to take the remedial actions needed to provide service to a customer within the time promised.

The second of BA-NY's August 1999 -2 results for heavily weighted metrics is for "Percent Missed Loop Repair Appointments" (MR-3-01-3100), which is weighted 20 for

⁶⁴ NP-07-2000 (Average Delay days - Physical). *Id.*

⁶⁵ Under the PAP, -1 scores in only one of three consecutive months are not penalized.

PAP/CCAP purposes. In August, BA-NY missed 10.47% of its own customers' repair appointments, but 14.00% of the repair appointments for CLEC customers'. The statistical significance of this disparity in service is measured by the PAP/CCAP as -6.27 Z score, with any result lower than -1.645 scored a -2 (BA-NY's service to CLECs on this metric is thus 3.8 times worse than the -2 threshold). Missed repair appointments cause customers to remain without service for unnecessarily long periods, and require customers to reschedule repair visits.

The third BA-NY August 1999 heavily weighted metric scored in the -2 range was "Loop Mean Time To Repair" (MR-4-02-3100), weighted 15 by the PAP. This metric is scored according to how long it took BA-NY to repair loop troubles for its own customers on average during the month, as compared to how long BA-NY took to repair CLEC loop troubles. BA-NY's August average repair time for its own customers was 25.32 hours, as compared to 26.22 hours for the CLECs (54 minutes longer), a statistical difference of -1.74 Z score. Although still in the -2 range, this performance was only slightly below the threshold for this score range, so BA-NY may readily be able to bring this performance metric up to parity level.

The upcoming report for BA-NY's September monthly performance data⁶⁶ can provide the Commission with an indication of whether BA-NY's performance has improved enough in problematic areas. Although the Commission has in the past been reluctant to consider new evidence that post-dates the application, and justly so, there is good reason to consider an

⁶⁶ BA-NY's September performance data is due to be released October 25, 1999, and may be addressed in the parties' reply comments.

exception in this instance.⁶⁷ BA-NY has demonstrated that it is performing most of the checklist items adequately, and ought not be rejected outright if it can show that it achieves the standard of non-discriminatory access within the 90-day period for the Commission's consideration of the application.

IV. The Commission Must Determine Whether The Public Interest Would Be Served By Approving BA-NY's Application.

In addition to determining whether BA-NY has demonstrated compliance with Section 271's 14-point checklist, the Commission must conclude that granting the application would serve the public interest, convenience, and necessity.⁶⁸ This determination is a separate and additional statutory requirement under Section 271,⁶⁹ and the Commission has broad discretion to identify and determine the factors which are relevant to such an inquiry.⁷⁰

A. Stronger Anti-Backsliding Measures Are Necessary To Ensure That BA-NY's Local Market Is Irreversibly Open To Competitive Entry.

1. Anti-backsliding Measures Are Vital To Protect Local Service Competition After BA-NY Is Granted Permission To Offer In-Region InterLATA Service.

The public interest inquiry must include a determination that the New York local market will remain open after BA-NY enters the interLATA market, *i.e.*, that it is "irreversibly open."⁷¹

⁶⁷ *See, infra*, Part V.

⁶⁸ § 271(d)(3)(C).

⁶⁹ *Michigan*, ¶ 389.

⁷⁰ *Louisiana II*, ¶ 362.

⁷¹ *See, Louisiana II*, ¶ 16; *South Carolina*, ¶ 36, and DOJ evaluations cited therein.

A highly critical factor for the Commission is "a BOC's agreement to submit to enforcement mechanisms in the event it falls out of compliance with agreed upon performance standards."⁷²

Anti-backsliding provisions are necessary and appropriate to prevent discriminatory and unequal service by BA-NY that might stifle local service competition in New York after authority to compete in the long-distance market is secured and the Section 271 incentive to provide nondiscriminatory access is gone. Such provisions do not create an open market, but are a form of insurance policy after the market is deemed open, designed to discourage and penalize anti-competitive BA-NY behavior in those areas where the CLECs are dependent on BA-NY facilities, systems and operations.

In the NYSPSC proceeding,⁷³ BA-NY has proposed a PAP/CCAP to demonstrate its commitment to continue to provide non-discriminatory access to all elements of its bottleneck services necessary for CLECs to enter and continue in the local New York after BA-NY obtains permission to offer in-region interLATA service.⁷⁴ This is a very significant commitment by BA-NY. However, the terms of the anti-backsliding measures that will ultimately be approved by the NYSPSC will not be known until sometime after the parties must file initial and reply

⁷² *Louisiana II*, ¶¶ 11 (Public Interest Standard), 363-364.

⁷³ NYSPSC Case 97-C-0271, *Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996*; and NYSPSC Case 99-C-0949, *Petition filed by Bell Atlantic-New York for Approval of a Performance Assurance Plan and Change Control Plan in 97-C-0271*.

⁷⁴ See, *BA-NY Application, Brief*, pp. 68-71; *Dowell/Canny Declaration*, ¶¶ 15-17, 118-157.

comments on BA-NY's application. Currently, the NYSPSC is considering numerous PAP/CCAP amendments proposed by BA-NY on September 24, 1999, and comments offered by various parties on October 4, 1999. The public comment period before the NYSPSC does not end until October 23, 1999. The earliest that the NYSPSC might decide the outstanding issues is at its October 27, 1999 public session. Therefore, at this juncture our comments discuss the company's September 24, 1999 proposed PAP/CCAP.

Under the PAP, BA-NY's performance is measured by the extensive set of C2C service quality standards developed over more than two years of effort by the NYSPSC and all interested parties. However, a number of significant measures in the problematic areas of change control, flow through, and hot cut provisioning remain unresolved, and BA-NY projects that many measurements will remain under development until well into next year.⁷⁵

The proposed PAP/CCAP provides that if BA-NY's service to CLECs falls significantly below either parity with BA-NY's retail performance or the absolute standards for those measures where no analogous BA-NY retail function exists, specified compensation would be paid in the form of bill credits to the CLECs affected by BA-NY's sub-standard service. The bill credits that would be due to CLECs are computed monthly but paid quarterly, according to a complex scheme that focuses on four "modes of entry" that may be used by different CLECs to

⁷⁵ There are currently 100 C2C measures still under development, as illustrated in Attachment D, pp. 96-108 of 108 accompanying BA-NY's *Dowell/Canny Declaration*. See, measurements marked "UD."

serve local customers⁷⁶ and on twelve "critical measures" of BA-NY service essential for competition in the local market.⁷⁷

However significant the current proposals, the anti-backsliding protections proposed in BA-NY's PAP/CCAP in several important respects still do not go far enough to discourage BA-NY from engaging in anti-competitive after the incentive of entry to the interLATA market is no longer there.

2. The Proposed Penalty Cap Should More Closely Reflect The BA-NY Profits At Risk In The Local Market.

BA-NY proposes to limit its liability under the PAP/CCAP to \$269 million per year. While \$269 million is a substantial sum, it is still well below the almost \$500 million in local service profits that is at risk if BA-NY's local market opens to competitive entry. For the year ending August 31, 1998 BA-NY obtained total revenue of \$4.9 billion⁷⁸ from intrastate

⁷⁶ These are: resale, unbundled network elements ("UNE"), interconnection trunks and collocation.

⁷⁷ These are: OSS Interface Response Time, OSS Interface Availability, LSRC Accuracy, Loop Missed Appointments, Platform Missed Appointments, Hot Cut Performance, Hot Cut Trouble Reports, UNE-P Performance Timeliness, Repair Speed, Repair Reliability, Final Trunk Group Blockage and Collocation Performance.

⁷⁸ Attachment 1, p. 3 of 9 to BA-NY's July 22, 1999 *Performance Regulatory Plan Year 3 Annual Filing Revisions* in NYSPSC Case 92-C-0665, *Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company, Track 2*, attached as *NYSAG Appendix C ("PRP Year 3 Filing")*. Indeed, the NYSPSC has indicated that BA-NY has significantly understated its net intrastate revenues. *See, Id., Order Directing the Accounting for Certain Revenue Streams and Expense Credits*, issued August 12, 1999, fn. 1, which states "preliminary adjustments to the calculations indicate that the company's intrastate return on equity for the year ending August 31, 1998 is significantly higher than that calculated by the company."

operations.⁷⁹ The revenues that BA-NY risks by opening its local service territory to competition are at least its net local market revenues of \$495 million.⁸⁰

The principle that in order to effectively deter certain conduct, sanctions should be much larger than the cost to comply, is applicable to the anti-backsliding proposal. For example, antitrust treble damage provisions factor in such considerations as the potential that wrongful conduct might go undetected, would take time to penalize, and could cost the enforcers and adversely affected competitors significant expense.⁸¹

BA-NY's proposal to allow the NYSPSC to reallocate unused PAP/CCAP penalties to put more of the \$269 million annual cap at risk in specific problem areas as they arise makes the PAP/CCAP stronger, although it does not alleviate the inadequacy of the annual penalty limit. Giving the NYSPSC the flexibility to reallocate unpaid penalty amounts⁸² resolves one serious flaw of the earlier proposal, namely, that individualized penalty amounts for specific deficiencies

⁷⁹ This figure includes intraLATA toll and other revenues. This figure is also a year old; it is likely that the figures for the current year to be higher due to growth in BA-NY's total access lines in service and usage levels. BA-NY has confirmed these figures. See, NYSPSC Case 99-C-0949, *supra*, BA-NY October 8, 1999 *PAP Reply Comments*, p. 9, fn. 9.

⁸⁰ *PRP Year 3 Filing, supra*. Some parties urge that the maximum PAP and CCAP incentive should be set according to the net revenues BA-NY is likely to gain by offering unrestricted long distance service. However, the goal of Section 271 is primarily to open local service to competition.

⁸¹ See 15 U.S.C.A. § 15. See also, *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 314, (1978) (The antitrust treble damages sanction "has two purposes: to deter violators and deprive them of 'the fruits of their illegality,' and to compensate victims of antitrust violations for their injuries" (citations omitted)).

⁸² *BA-NY Proposed Amended PAP*, p. 4.

were inadequate. However, BA-NY's proposed requirement that the NYSPSC notify BA-NY of any such penalty reallocation 15 days before the start of any applicable performance month would significantly limit the degree of flexibility this amendment to BA-NY's PAP/CCAP would provide in practice.⁸³

Assuming that the NYSPSC exercised this penalty reallocation flexibility in such a manner as to impose the maximum penalties provided under BA-NY's proposed PAP/CCAP, the plans still would cap the CLEC bill credits at \$269 million annually. Because the behavior that the PAP/CCAP seeks to deter is anti-competitive acts in BA-NY's local market, the incentive should be sufficiently substantial and should be keyed to the market BA-NY might seek to protect, which is its local market.

3. BA-NY's PAP Is Not Self-Executing And Numerous Proposed Waiver Provisions Of the PAP And CCAP Would Undermine The Effectiveness Of Their Anti-Backsliding Protections.

The Commission has recognized that anti-backsliding mechanisms are most effective when they are self-executing and automatically triggered by noncompliance with the applicable performance standard and are not at risk of lengthy regulatory or judicial intervention.⁸⁴

⁸³ The 15-day advance notification requirement must be judged in light of the fact that the performance data for any month are not available until at least the 25th of the following month. For example, if the NYSPSC determined that BA-NY's performance in January was particularly deficient, the data upon which it relied would not have been available until February 25. The 15-day notice provision would then preclude giving enough notice for the heightened penalties to begin to apply to March performance. At the earliest, April would be the first month in which BA-NY's performance would risk higher penalties. Thus highly deficient performance could continue for three months, at a minimum, before it became subject to special penalties.

⁸⁴ See, e.g., *Louisiana II*, ¶364.

The efficacy of the proposed PAP/CCAP is undermined because BA-NY has proposed multiple forms of penalty waivers which individually, and cumulatively render the plans non-automatic and open to challenge.

In the PAP, BA-NY proposes three penalty waivers: (1) if the company can show that "clusters" of data within small sample sizes for particular measures exaggerate the impact of substandard performance data;⁸⁵ (2) if it can show that its poor performance is caused by "CLEC behavior;"⁸⁶ and (3) if any deficient absolute performance measure metric is found to have been caused by "circumstances" beyond the company's control.⁸⁷

BA-NY also proposes two forms of penalty waivers in the CCAP. BA-NY proposes a waiver of CCAP bill credits if it decides to withdraw any proposed software release, even if CLECs have incurred costs to adjust their software in response to a release BA-NY proposed and abandoned.⁸⁸ BA-NY also proposes a broad CCAP waiver of penalties if the NYSPSC deems any of its standards "would not serve the public interest" in the event that "BA-NY could not, through any reasonable efforts, prevent the results that do not satisfy the standards."⁸⁹

Once BA-NY invokes these waiver provisions, some of which are rather broad and vague, lengthy evidentiary proceedings could ensue first before the NYSPSC, and then in

⁸⁵ *Proposed Amended PAP*, pp. 18; and Appendix D attached thereto.

⁸⁶ *Proposed Amended PAP*, pp. 18-19.

⁸⁷ *PAP/CCAP Petition, supra*, p. 10, *Amended PAP*, pp. 16-17.

⁸⁸ *Proposed Amended CCAP*, p. 2.

⁸⁹ *Id.*, p. 3.

subsequent court appeals. CLECs and regulators could face the prospect of endless litigation of one or more such waiver claims by BA-NY, expending valuable resources and delaying BA-NY's delivery of bill credits.⁹⁰ Especially for smaller CLECs, the cost of pursuing such multiple layers of penalty appeals could exceed whatever financial benefit they might have obtained from the penalties.

In a related context, the NYSPSC has recognized the importance of speedy implementation of service performance incentive payments under BA-NY's Performance Regulatory Plan ("PRP"):

... when rebates are due customers, they should be paid as expeditiously as possible, both to allow customers to receive their due compensation in a timely manner and to reinforce the incentive effect of the rebates.⁹¹

However, based upon the experience under BA-NY's end-user service standards which trigger customer rebates under the PRP, the potential for frequent PAP/CCAP waiver claims is great cause for concern (since the PRP began on September 1, 1995, BA-NY has sought performance waivers of at least 17 reporting months' data for a variety of reasons, and the NYSPSC has routinely taken a year or more to decide each request).⁹²

⁹⁰ BA-NY has stated that PAP/CCAP bill credits that are overturned through the various waiver proceedings would subsequently be recovered from the CLECs through offsets against other carrier bills credits or by billing the CLECs. *PAP Reply Comments, supra*, pp. 27-8.

⁹¹ NYSPSC Case 92-C-0665, *supra*, Order Modifying And Adopting New York Telephone Company's Proposed Plan for Service Quality Data Sampling and Error Correction, issued May 9, 1996, p.3.

⁹² These 18 months' waivers comprise 38% of the 48 months during the first four years of the PRP (September 1, 1995 through August 31, 1999). *See, e.g.*, NYSPSC Case 92-C-0665, *supra*, BA-NY's petition to waive service quality performance results for September 1995

4. The Amount At Risk In BA-NY's Proposed Change Control Plan Is Inadequate.

Because of the need for CLECs to interface with a multitude of BA-NY's automated ordering, repair, and database computer systems, and because BA-NY is continually modifying its software to keep up with changes in its and the CLECs' needs, a viable change control process is vital to enable competitors to operate in the New York local service market. No commercial operation can be expected to adjust to software changes without adequate notice, coordination, and disclosure of the documentation needed to adjust the CLECs' systems to accommodate the changes planned by BA-NY. The proposed limitation of penalties in the CCAP to \$25 million,

through February 1996, the first six months of the PRP, decided December 13, 1996 and reconsideration request decided June 30, 1997; BA-NY's petition to waive October 1996 service performance results, decided April 28, 1997; BA-NY's petition to waive service performance results for December 1996, decided October 31, 1997; BA-NY's petition to waive April 1997 service performance results, decided on January 12, 1997; BA-NY's petition to waive June 1997 service performance results, decided on January 12, 1997; BA-NY's BA-NY's petition to waive October 1997 service performance results, decided on July 27, 1998; April 13, 1998 BA-NY petition to revise the PRP to permit automatic waivers in specific circumstances--never decided by the NYSPSC; BA-NY's petition to waive January 1998 service performance results, decided on August 10, 1998; BA-NY's petition to waive February 1998 service performance results, decided on August 10, 1998; BA-NY's petition to waive June 1998 service performance results, decided on June 18, 1999; BA-NY's petition to waive August 1998 service performance results, still undecided; BA-NY's petition to waive September 1998 service performance results, still undecided; BA-NY's petition to waive January 1999 performance results, still undecided; BA-NY's petition to waive July 1999 service performance results, still undecided. BA-NY's waiver petitions are not the only ones that take a long time to be decided by the NYSPSC. *See*, NYSPSC Case 93-C-0033, *Petition of Rochester Telephone Corp. For Approval of a Multiyear Rate Stability Agreement -- Request of Rochester Telephone Corp. For a waiver of certain service quality results for the months of April, May, June, July and August 1996, that otherwise would be included in the calculation of the Service Quality Assurance Plan under the Open Market Plan*, decided on June 11, 1997).

\$15 million of which would be subtracted from the PAP penalties cap, is inadequate to prevent non-discriminatory treatment of the CLECs.

5. BA-NY's Proposed Anti-Backsliding Plans Depend On Still Unsettled Issues, And Have Not Been Adopted By The New York Commission.

BA-NY's proposed PAP/CCAP is currently the subject of a proposed rulemaking at the NYSPSC and has not been approved. BA-NY proposed a host of changes to both the PAP and the CCAP on September 24, 1999⁹³ and the NYSAG and others filed extensive comments and proposed modifications thereto on October 4, 1999.⁹⁴ The public comment period closes on October 23, 1999⁹⁵ and no determination can be made until after that date.⁹⁶ Therefore, the proposed PAP/CCAP described in BA-NY's Application is not final.

In addition to concerns raised by commenters before the NYSPSC, which could conceivably change the final plan, at least three new and important metrics are proposed by BA-NY to be added to the PAP/CCAP in the future.⁹⁷ The performance standards for these

⁹³ See, Proposed *Amended PAP/CCAP*.

⁹⁴ Comments were filed October 4, 1999 on BA-NY's proposed *Amended PAP/CCAP* with the NYSPSC by the NYSAG, the New York State Consumer Protection Board, AT&T Communications of New York, Inc., MCI Worldcom, RCN, NEXTLINK, and the Competitive Telecommunications Association.

⁹⁵ NYSPSC Case No. 99-C-0949, *supra*, *Notice of Proposed Rulemaking*, issued August 30, 1999, p. 26.

⁹⁶ The NYSPSC is scheduled to meet on October 27, 1999, and may render a ruling on the PAP/CCAP proposal at that time.

⁹⁷ These are: Percent Flow Through - Total (OR-5-3); Hot Cut Provisioning Measures (incorporating the due date minus two days procedures); and Digital Subscriber Loop performance standards.

additional metrics are still being developed in the NYSPSC C2C proceeding. Once they are developed, they need to be applied. Therefore, it is unclear how quickly these metrics would provide meaningful data on BA-NY's actual performance.

Because the PAP/CCAP was not final as of the date of BA-NY's application, and indeed is still not final, the Commission does not now have a basis to judge the adequacy of this crucial part of its determination as to whether the local market is fully and irreversibly open. Rather than let BA-NY's application fail for want of this necessary component, the Commission should consider any final plans which emerge from the current NYSPSC proceeding, as long as they are issued sufficiently before the 90-day deadline to enable their provisions to be considered, and as long as the parties to this proceeding have a timely opportunity to comment on them to the Commission.

B. The Public Interest Is Only Served If The Local Market Is Open To Competition Before BA-NY Long Distance Entry Is Permitted.

BA-NY asserts that the long distance market is the only relevant market to consider with respect to the public interest inquiry.⁹⁸ Even though it acknowledges that the Commission has adopted a different view, BA-NY nevertheless devotes most of its public interest analysis to the long distance market. However, to assess only the long distance market is entirely too narrow an approach⁹⁹ and ignores the premise of Section 271, that if the local market is not first open to competition, BOC entry into the long distance market will not, per force, be in the public

⁹⁸ *BA-NY Application, Brief*, p. 56, fn. 46.

⁹⁹ *See Michigan*, ¶ 386.

interest. The Commission has consistently underscored this fundamental point in its consideration of Section 271 applications: "Congress further recognized that until the BOCs open their local markets, there is an unacceptable danger that they will use their market power to compete unfairly in the long distance market" (*Louisiana II*, ¶ 3). "Congress... acknowledged...that BOC entry into the long distance market would be anticompetitive unless the BOCs' market power in the local market was first demonstrably eroded by eliminating barriers to local competition" (*Michigan*, ¶ 18). "[BOC's entry into the long distance market] would surely give long distance carriers an added incentive to enter the local market. But even such an incentive would not be enough to overcome the structural obstacles to competition that new entrants face as a result of [BOC] failure to provide nondiscriminatory access to OSS [and] unbundled network elements" (*South Carolina*, ¶ 25).

Thus, the competitive effect on the long-distance market of BA-NY's entry should certainly be analyzed as part of the public interest inquiry,¹⁰⁰ but any such analysis must consider the very different consequences to both the long-distance and the local market (and therefore to the public interest) which would result depending upon whether at the time of long distance entry the local market is or is not open to competition. If the local market is not yet open to competitive entry under the terms of the Section 271 checklist, the public interest could not possibly be served by permitting BA-NY to enter the long distance market. No amount of BA-NY argument can change that conclusion.

¹⁰⁰ *Id.*, ¶ 388.

V. Under The Unique Circumstances Of This Application, The Commission Should Consider Certain New Evidence, Rather Than Reject The Application Based On The Evidence As Of The Date Of Filing.

There are significant deficiencies in BA-NY's application, as discussed in these comments. While it would certainly not be in the public interest to approve this application before the New York local exchange market is demonstrably open to competitive entry under Section 271, neither would it serve the public interest to reject the application if new evidence could verify, during the application's 90-day pendency, that the concerns expressed in these comments are resolved and that the New York local market is indeed open as of that time.

The Commission has made very clear that it will not consider any new evidence submitted by the applicant relating to any time frame beyond the end of the initial 20-day comment period.¹⁰¹ The reasons for not considering new evidence are substantial and convincing. However, this is the strongest application the Commission has yet received. Given the iterative and intense effort to date, under the auspices of a very attentive state commission, the fact that most checklist items are satisfied, and the actual and expected existence of concrete new evidence which might dispose of the remaining concerns (or which might, alternatively, indicate that the deficiencies have not been remedied during this time period), the Commission should make an exception to its prior practice in Section 271 proceedings. It should consider specific material evidence that has or will come in after the date of filing in making its determination, so long as that evidence is presented with sufficient time to be fairly considered

¹⁰¹ See, e.g., "Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act," FCC Public Notice (September 28, 1999). See also *Michigan*, ¶¶ 52-54.

by the Commission, consists only of new objective information presented by the NYSPSC to this Commission and to all the parties, and provides the parties with have a fair opportunity to respond.

In particular, the Commission should consider (1) the performance data for September 1999, which will be available on or around October 25, 1999; and (2) the final PAP/CCAP, when ordered by the NYSPSC after their public session on October 27, 1999, including the new metrics proposed by BA-NY in its proposed amended PAP/CCAP, but still not finalized, which address flow-through, loop hot cuts, and DSL loops provisioning. The parties might need additional time to respond to this or other new evidence, which the current reply dates of November 8 and the DOJ evaluation filing date of November 1 might not provide.

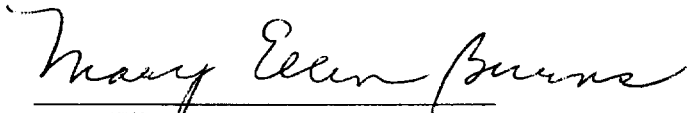
The NYSPSC has made extraordinary efforts in its proceedings; thus it is appropriate to grant some leeway for the introduction of new objective evidence when the BA-NY application is so close to meeting the requirements. By the same token, the problems still outstanding are serious and not trivial, and it is not yet clear that BA-NY can fix them adequately within the time frame of the Commission's consideration of BA-NY's application. What is clear is that the application cannot be approved if, at the end of the day, access to BA-NY's bottleneck services remains problematic.

The procedure suggested here would give BA-NY an expeditious chance to obtain entry into the long-distance market, if it is then warranted, rather than face rejection, as it may, on the record as of September 29. It would also assure that New York's residents and businesses obtain a local exchange market open to competitive entry.

CONCLUSION

For the all the reasons stated herein, the Commission should only approve BA-NY's application if reliable new evidence, such as described above, demonstrates that BA-NY has indeed opened up its facilities to competitive entry in accordance with all the requirements of Section 271 and Section 272.

Respectfully submitted,

A handwritten signature in cursive script, reading "Mary Ellen Burns".

Mary Ellen Burns
Assistant Attorney General in Charge
Telecommunications and Energy Bureau .

Charlie Donaldson
Keith H. Gordon
Assistant Attorneys General
of counsel

New York State Attorney General's Office
Telecommunications and Energy Bureau
120 Broadway
New York, NY 10271
(212) 416-6343
FAX (212) 416-8877
E-mail: mary.burns@oag.state.ny.us
charlie.donaldson@oag.state.ny.us
keith.gordon@oag.state.ny.us

LIST OF APPENDICES

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